

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EMMA JEAN KINDER,

Plaintiff,

v.

Civil Action No. 5:17CV165  
(STAMP)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

**MEMORANDUM OPINION AND ORDER**  
**AFFIRMING AND ADOPTING REPORT AND**  
**RECOMMENDATION OF MAGISTRATE JUDGE,**  
**GRANTING UNOPPOSED MOTION TO REMAND AND**  
**DENYING AS MOOT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. Procedural History

The plaintiff, Emma Jean Kinder, by counsel, filed a complaint in this Court to obtain judicial review of the defendant's final decision pursuant to 42 U.S.C. § 405(g) of the Social Security Act. The defendant, by counsel, filed an answer to the complaint, and the plaintiff filed a motion for summary judgment. The defendant then filed an unopposed motion to remand the civil action to the Commissioner of Social Security pursuant to the fourth sentence of 42 U.S.C. § 405(g). The unopposed motion to remand represents that, upon further review, the Appeals Counsel has determined that further evaluation of the plaintiff's claim is warranted.

The unopposed motion to remand states that, upon remand, the Commissioner of Social Security, through the Appeals Council, will refer the plaintiff's claim to an Administrative Law Judge. The

Administrative Law Judge will then (1) further clarify whether the plaintiff has a limited or marginal education and ensure that the educational requirements in the mental residual functional capacity findings are consistent with that determination; (2) if the plaintiff is determined to have a marginal education, apply the appropriate rule in the Medical-Vocational Guidelines to determine whether she would be considered disabled at age 60 when closely approaching retirement age; and (3) take further action to complete the administrative record resolving the above issues and issue a new decision.

United States Magistrate Judge Michael John Aloï then entered a report and recommendation in which he recommends that the unopposed motion to remand be granted and that the case be remanded to the Commissioner of Social Security pursuant to the fourth sentence of 42 U.S.C. § 405(g). Neither party filed objections to the report and recommendation. For the following reasons, this Court affirms and adopts the magistrate judge's report and recommendation.

## II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to those portions of a recommendation to which no objection is made, a magistrate judge's findings and recommendation will be upheld

unless they are clearly erroneous. Because neither party filed objections, this Court will review the magistrate judge's findings and recommendations under the clearly erroneous standard.

### III. Discussion

"A district court may remand a final decision of the Secretary only as provided in sentences four and six of 42 U.S.C. § 405(g)." Melkonyan v. Sullivan, 501 U.S. 89, 90 (1991). Sentence four of 42 U.S.C. § 405(g) gives the courts the "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Sentence six of 42 U.S.C. § 405(g) authorizes the court to remand in two scenarios: (1) "on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer," or (2) upon a plaintiff's "showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." While a district court does not enter a final judgment when remanding under sentence six, a final judgment is required when remanding under sentence four. See Shalala v. Schaefer, 509 U.S. 292, 297-98 (1993).

This Court finds no clear error in the magistrate judge's conclusion that remand under sentence four of 42 U.S.C. § 405(g) is most appropriate in this case. The unopposed motion to remand does

not assert or address good cause and the Commissioner of Social Security has already filed its answer. Thus, sentence six is inapplicable. Accordingly, this Court agrees with the magistrate judge that the civil action should be remanded to the Commissioner of Social Security under sentence four of 42 U.S.C. § 405(g).

#### IV. Conclusion

For the reasons above, the magistrate judge's report and recommendation (ECF No. 11) is hereby AFFIRMED and ADOPTED. Thus, the plaintiff's motion for summary judgment (ECF No. 9) is DENIED AS MOOT and the defendant's unopposed motion to remand (ECF No. 10) is GRANTED. Accordingly, this civil action is REMANDED to the Commissioner of Social Security for further proceedings consistent with the defendant's unopposed motion to remand. It is ORDERED that this civil action be DISMISSED and STRICKEN from the active docket of this Court.

Finally, this Court finds that the parties were properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the parties have failed to object, they have waived their right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to counsel of record herein and to the Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: April 25, 2018

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE